(1) Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

VICTORIA L. TRENT, aka VICTORIA L. WINEBARGER,

Petitioner,

vs.

VALLEY ELECTRIC ASSOCIATION, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Under *Anderson v. Bessemer City*, 470 U.S. 564 (1985), can a determination as to the credibility of the employer's witness preclude an examination of the relevant evidence of pretext, or under *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), does this merely trigger further inquiry?

PARTIES TO THE PROCEEDING

Only the parties named in the caption were before the Court of Appeals; namely, Victoria L. Trent aka Victoria L. Winebarger and Valley Electric Association, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Victoria L. Trent aka Victoria L. Winebarger ("Trent"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeal for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Trent v. Valley Electric Association, Inc.*, 41 F.3d 524 (9th Cir. 1994) (*Trent I*) (App. A). *Trent v. Valley Elec. Ass'n* (*Trent II*), 111 F.2d 138 (9th Cir. 1997) (table), *Trent v. Valley Electric Ass'n*, 9th Circuit No. 98-16228, November 9, 1999 (*Trent III*) (App. C). Amended Order denying Trent's petition for rehearing and rejecting suggestion for rehearing en banc No. 98-16228, January 6, 2000 (App. D).

STATEMENT OF JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") was entered on December 27, 1999, and amended on January 6, 2000. The Court of Appeals denied a timely petition for rehearing and rejected the suggestion for rehearing en banc. (App. D).

The jurisdiction of this Court is invoked under 42 U.S.C. § 2000e-3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-3(a) provides as follows:

(a) Discrimination for making charges, testifying, assisting, or participation in enforcement proceedings.

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprentice or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

This case has a protracted history in the lower courts with two (2) separate trials occurring and three (3) separate appeals. Trent lost at the district court on three occasions and obtained two reversals.

Trent I resulted from the court's grant of summary judgment for defendants that Trent had not stated a *prima facie* case (App. E). The Court of Appeals ruled that Trent had stated a *prima facie* case and the case was returned to the district court for trial before Judge George (App. A).

The case was tried on remand. The court relied upon the credibility of the two (2) management witnesses, Ross Dohlen and Richard Burasco, for the defendant, Valley Electric Association (VEA), who stated, contrary to their prior sworn statements under oath,[1] that Trent had not been retaliated against because her termination was remote in time from the protected activity, a period of less than 30 days, their prior contradictory statements stated that the decison to terminate her had occurred approximately 20 days before her protected activity. The court determined that the purported good faith reason was *bona fide* despite all the evidence to the contrary based on the credibility determination regarding Dohlen. This evidence included, at a minimum, that Trent had been a satisfactory employee, that VEA had hired no other non-clerical females during the time the witnesses were running the operation, that the reason given for termination was known and discussed at the time of Trent's hire, and that VEA did not follow through or undertake any other steps to address the alleged concerns which caused Trent's termination. See *Trent II* Memorandum (App. B).

On appeal in *Trent II*, the Court of Appeals determined, after reviewing all the evidence that the evidence compelled a decision in Trent's favor and remanded for trial based upon the clear error.[2]

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[1] The affidavit submitted in support of summary judgment motion contained statements of fact at issue in Trent's second issue.

[2] The first trial terminated before Valley Electric Association presented its defense. It is asserted as well as conceded that there were no discrepancies of significance in evidence presented at the first and second trial, however, the

The case was then tried a second time, at which time one of the "credible" witnesses at the first trial, Burasco, retreated from or gave testimony not supportive of VEA, and the court determined that only Dohlen, whom the court termed a "mild formal businessman" was a credible witness. Other than the statements of Dohlen, there was no evidence presented to substantiate the legitimate business reason advanced for Trent's termination occurring at the time it did.

The district court ruled, based upon Dohlen's credibility, that VEA had put forth a legitimate business reason for discharge and, therefore, denied Trent's retaliation claim. (Opinion, App. E).

On appeal, the Court of Appeals ruled that the decision was based solely on a credibility determination of Mr. Dohlen and, therefore, the Court of Appeals would not disturb the decision of Judge George.

In all three decisions, the district court held that the good faith business reason was credible and Trent needed a quantum of proof to rebut the reason which could not be met, according to the district court as opposed to the Court of Appeals.

A petition for rehearing was filed with the Court of Appeals and denied on January 6, 2000, in an Amended Order.

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timing of the dismissal of the case in *Trent II* required remand for retrial.

REASONS FOR GRANTING THE WRIT

This case demonstrates the district court's refusal to consider evidence of retaliation properly. The case now stands directly against the express holdings of *St. Mary's Honor Center* and *Anderson*.

The case also embodies and exemplifies the proof issues involved in a retaliation case where an ostensibly credible witness puts forth a good faith business reason which can only be impeached circumstantially.

1. **Under *Anderson v. Bessemer City*, 470 U.S. 564 (1985), can a determination as to the credibility of the employer's witness preclude an examination of the relevant evidence of pretext, or under *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), does this merely trigger further injury?**

The underlying merit in Trent's case is attested to by the unusual and rarely seen reversal of Judge George after the first trial by the Court of Appeals when it reviewed all of the evidence, notwithstanding the fact that the Court of Appeals accepted the district court's finding that a witness who had submitted false testimony, either in his affidavit or at trial to be sufficiently credible as to serve as the basis for the district court's decision.

Trent was hired in 1988 by VEA. She was living with Mr. Winebarger, whom she later married, who read meters in rural Nevada for VEA. Part of her duties, two days a month, required Trent to read meters.

Trent went to a required safety meeting at which at least one sexually offensive joke was told by the presenter. She complained and put her complaint in writing in August 1988. One month later, she was terminated, allegedly because the VEA manager, Dohlen, decided the living arrangement of Trent and Winebarger created a conflict because Trent and Winebarger both read meters. This was known at all times.

Trent sought reinstatement, relocated and worked for another electric company until she was laid off as the result of a merger. Trent has never been offered her job back or any other job by VEA despite VEA's stated desire to keep her and her favorable job evaluation.

There are several facets to the issue involved herein. However, the question presented for review demonstrates both a problem arising from the court's interpretation of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), and the burdens of proof thereon.

On three separate occasions the district court held that presentation of a credible, good faith business reason precluded a claim of retaliation against defendants On two occasions, the United States Court of Appeals for the Ninth Circuit ruled this was error, but on the third occasion, it ratified the decision of the district court by holding that the district court's determination that a credible good faith business reason had advanced, was not subject to challenge, and, therefore, the court's decision denying Trent's claim for retaliation was correct under *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

In the second unpublished Memorandum, *Trent v. Valley Elec. Ass'n* (*Trent II*), 111 F.2d 138 (9th Cir. 1997)

(table), following *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), the Court of Appeals reviewed the evidence presented at the first trial and determined the evidence when viewed in its totality compelled a decision in Trent's favor.

Dohlen submitted a sworn statement to the Nevada Equal Rights Commission (App. F) and an affidavit in support of a motion (App. G) and in interrogatory answers that the decision that Trent was to be terminated was in August, 1988, before her complaints, then, in court, testified the decision was made afterwards (App. H, p. 136:6-14). Though neither the district court nor the Court of Appeals put any significance in this changed testimony, it was clearly relevant to Trent's circumstantial case where Dohlen's claim was that he suddenly in early September decided a problem existed that required Trent's termination, a problem that was discussed months before at the time of her hire. In light of Judge George's comments on Dohlen's appearance and demeanor, overlooking perjury by Dohlen on a subjective matter is suspect itself, but reversal is appropriate even if the court does not reach that issue as Dohlen's subjective proffer of a good faith business reason is but one factor to consider. The record is clear that the court intended to, and did, base its determination solely on the credibility determination regarding Dohlen in upholding the good faith business reason.

If a determination that the person proffering a good faith business reason is credible without consideration of all relevant evidence is determinative in a retaliation case, the holdings in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *St. Mary's Honor Center* are overruled. The

trial court did not give Dohlen's statement weight in a balancing of evidence, it made it determinative. *St. Mary's Honor Center's* and *Trent II* clearly held that this was incorrect, and that absent additional evidence Trent must prevail (*Trent II*).

In *St. Mary's Honor Center,* the court stated the rule that the presentation of a credible good faith business reason merely triggers the inquiry into the totality of facts. It is consistent with the determination of the Court of Appeals in *Trent I,* and with the text of 42 U.S.C. § 2000e-3 that without a credible good faith business reason being presented by the employer, summary judgment would be appropriate for a plaintiff against his employer.

The decision of the Court of Appeals in *Trent III* effectively precludes a *St. Mary's Honor Center v. Hicks* inquiry because to trigger such an inquiry the plaintiff must first present a *prima facie* case and the respondent must put forth a credible good faith business reason. The decision of Judge George affirmed by the Court of Appeals is that a determination by the trier of facts that the good faith business reason is credible precludes a plaintiff from prevailing. Though the district court in the underlying cases had said at this point the plaintiff must present direct evidence to contradict the good faith business reason, this particular district court in a related case has not found even the express statement of the employer to be sufficient direct evidence to refute the determination of a credible good faith business reason.

The misplaced reliance by the Court of Appeals upon *Anderson v. Bessemer City* further serves to compound the

problem as it is used to insulate the court's determination on solely a subject determination of the credibility of the person proferring a good faith business reason to preclude recovery. It is clear under *St. Mary's Honor Center v. Hicks*, and all other authority related to retaliation claims, that the employee generally must rely exclusively on circumstantial evidence to rebut the purported good faith business reason.

The district court's determination that Dohlen was credible while referring to him as a "mild formal businessman" and finding that to be sufficiently supportive of his credibility and honesty in addressing the court exemplifies the extreme danger the Trent case poses to effective enforcement of Title VII. If, as happened here, a witness can appear as a mild formal businessman with the demeanor of credibility, contradict prior sworn statements, and go against all other evidence presented at trial where such evidence has been determined by the Court of Appeals to be compelling, then Title VII has been fatally eviscerated.

The Court of Appeals in *Trent III* found that the credibility determination was determinative based on *Anderson v. Bessemer City, supra.* While the court's reading of *Anderson* was incorrect, it stretches credulity and is an affront to justice to uphold a decision based solely upon the credibility of a witness who has given directly contradictory statements to the trial court on the material issue.

Trent complained on August 19, 1988. She was terminated on September 19, 1988. The temporal connection between Trent's protected activity and her termination are relevant to the determination of pretext. In Dohlen's

affidavit for probable cause (App. G) he specifically stated that the termination decision was made on August 18, 1988, the day before her protected activity. If Trent was to be terminated before her protected activity, there would be no liability. However, at trial, Dohlen specifically denied that material statement of fact in his affidavit (App. H, pp. 105:4-12, 136:6-14).

The rehabilitation consisted of an incredible inquiry by Mr. Close that the reason the affidavit was submitted was that Mr. Close had prepared it and submitted for Dohlen's signature, and Dohlen apparently just signed it (App. H, p. 148:15-25). At a minimum, this demonstrates Dohlen's cavalier attitude toward his testimony and oath sufficient to impeach his credibility. At worst, it is perjury.

Though such perjured testimony could and should serve as conclusive evidence of pretext, it is incredible that the district court, ratified by the Court of Appeals in *Trent III*, bases its determination that no retaliation occurred on the testimony of either a perjuror or cavalier witness, Ross Dohlen. Unfortunately, *Anderson* does not support the decision of the Court of Appeals as *Anderson* deals with competing stories and competing versions of the fact. *Anderson* deals with mutually exclusive versions of fact which cannot be verified by extrinsic evidence. The district court in *Trent III* did not hold it was adopting one version of the facts as opposed to the other and, in fact, found Trent to be credible. It did not decide one set of facts against the other. It decided one side of the case versus the other.

The sole fact involved here was what occurred in the mind of Mr. Dohlen and when. His epiphany to terminate

Trent after her protected activity for a previously known reason does not support a finding of good faith. In light of the serious credibility issues related to Dohlen based on his contradictory statements, and a proper reading of *Anderson*, the Court of Appeals' conclusion that it could not review the decision in *Trent III* was erroneous.

CONCLUSION

While this case obviously represents a miscarriage of justice in its final outcome, the issues presented raise the critical means of analysis to determine whether a retaliation case exists in the context of pretext. The presentation of a credible good-faith business reason is not determinative of the issue of pretext but merely triggers the consideration of all evidence in which the credible good-faith business reason must be considered as it relates thereto.

The district court's exclusive reliance on Dohlen was misplaced.

DATED this 27th day of March, 2000.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTORIA L. TRENT, a/k/a VICTORIA L. WINEBARGER, *Plaintiff-Appellant,* v. VALLEY ELECTRIC ASSOCIATION, INC., *Defendant-Appellee.*	No. 98-16228 D.C. No. CV-S-92-00617-LDG OPINION

Appeal from the United States District Court
for the District of Nevada
Lloyd D. George, District Judge, Presiding

Submitted May 10, 1999.*
San Francisco, California

Filed November 9, 1999

Before: Harlington Wood, Jr.,** Alex Kozinski, and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Wood

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* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

** Honorable Harlington Wood, Jr., Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

COUNSEL

Ian Christopherson, Christopherson Law Offices, Las Vegas, Nevada, for the plaintiff-appellant.

Melvin D. Close and Patrick A. Rose, Jones Vargas, Las Vegas, Nevada, for the defendant-appellee.

OPINION

WOOD, Circuit Judge:

Victoria Trent appeals the district court's judgment in favor of her former employer, Valley Electric Association ("VEA"), entered after a bench trial of Trent's action alleging retaliatory discharge under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-3(a). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

BACKGROUND

Trent was employed by VEA, a rural public utility company, from February 9, 1988 to September 19, 1988, to read residential electric meters as an in-house reader. Since 1985, VEA had orally contracted with Jack Winebarger ("Winebarger") as an independent contractor to read 3500 meters in one of its more remote districts. When Trent was hired, both Ross Dohlen, general manager of VEA, and Richard Burasco, office manager, were aware that Trent and Winebarger had lived together since the 1980s. During a meeting with Burasco prior to Trent's hire, Winebarger and Trent specifically asked whether their personal relationship would be a problem. According to both Burasco and Dohlen, Trent's live-in relationship would not cause any increased risk to VEA's meter

reading function. In fact, she was hired in part because she already knew the location of many of the meters, having read them while working for Winebarger as one of his contract employees. Trent was the first woman ever hired by VEA for a position other than a clerical employee.

During her seven months on the job, Trent received good employment evaluations. At her final evaluation in late July/early August, Trent was rated as satisfactory or excellent with her overall rating approaching exceptional. Dohlen reviewed this evaluation and did not modify it or note any concerns about the cohabitation issue.

On July 20, 1988, Trent attended a mandatory safety meeting. On August 19, she complained to Burasco, her immediate supervisor, about improper conduct and inappropriate sexual remarks made at the July 20 meeting by the lecturer. Burasco asked her to put her account of the incident and her complaint in writing to be sent to Dohlen. Trent did so and discussed the matter with Dohlen the next day. Dohlen also interviewed at least one other employee who attended the safety meeting. On August 31, Dohlen wrote to the service company that conducted the safety meeting complaining about the lecturer's offensive comments.

On September 7, 1988, VEA signed its first written contract with Winebarger. The contract contained no clause addressing the issue of Winebarger's and Trent's cohabitation nor any possible conflict or risk arising from that situation. However, Dohlen testified that sometime in the latter part of August or early part of September, he began to be concerned that both of VEA's meter readers

resided in the same household. He testified that he worried that having both the inside and outside readers residing in the same house frustrated the purpose of having an in-house reader; that if Winebarger stopped reading meters for some reason, Trent might also stop, or that both might be injured in an automobile accident while together. However, Dohlen did not identify any specific event which caused him to become concerned. He testified that he considered the matter for several weeks, and finally came to a decision that the situation had to be corrected, and that it must be corrected by terminating Trent.

Dohlen instructed Burasco to terminate Trent. Burasco disagreed with the decision and argued with Dohlen against the termination. Burasco testified that he did not want to lose Trent because she was a good employee. Dohlen refused to change his mind. Therefore, on September 19, 1988, after the meters were read for that month's billing cycle, Trent resigned after being told by Burasco that she had to resign or she would be terminated. She then retracted her resignation and was immediately terminated. On September 30, Trent attended a meeting of VEA's Board of Directors and sought reinstatement. In spite of twenty consumers who protested her termination and hearing that she was a model employee, the Board did not reinstate her.

In 1993, the district court initially granted summary judgment in favor of VEA. *Valley Elec. Ass'n (Trent I)*, 41 F.3d 524 (9th Cir. 1994), reversed and remanded the case, holding that Trent had engaged in a "protected activity," therefore meeting the first requirement of a prima facie case of retaliatory discharge. *Id.* at 527. After a bench

trial, the district court granted VEA's motion for judgment on partial findings after Trent presented her case-in-chief. In a memorandum disposition, a second panel from the Ninth Circuit determined that the district court erred by not considering Trent's circumstantial evidence and remanded the case for a new trial, with instructions to weigh all the evidence, both direct and circumstantial. *See Trent v. Valley Elec. Ass'n (Trent II)*, 111 F.3d 138 (9th Cir. 1997) (table). After a bench trial, final judgment was entered in favor of VEA. This appeal followed.

ANALYSIS

A. Law of the Case

"Under the 'law of the case' doctrine, one panel of an appellate court will not reconsider questions which another panel has decided on a prior appeal in the same case." *Dean v. Trans World Airlines, Inc.*, 924 F.2d 805, 810 (9th Cir. 1991). This doctrine is not applicable where the previous appellate decision did not issue on the merits. *Mirchandani v. United States*, 836 F.2d 1223, 1225 (9th Cir. 1988). Although the panel in *Trent II* stated that "Trent's evidence would seem to compel a judgment in her favor," this pre-evaluation is dicta and not a decision on the merits. Therefore, the panel's statement is not binding under the law of the case doctrine. *See Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 715 (9th Cir. 1990).

B. Trial Court Findings

A judge's findings of fact are reviewed under the clearly erroneous standard. *Magnuson v. Video Yesteryear,* 85 F.3d 1424, 1427 (9th Cir. 1996). In Title VII actions, the district court's finding as to the credibility of an employer's proffered reason for adverse employment action is reviewed under the clearly erroneous standard. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 523-24 (1993).

The district court weighed the evidence and found that some favored VEA and some favored Trent. The court acknowledged that Trent was a good employee, but that her performance was not at issue and that a satisfactory employee can be terminated for a legitimate, non-retaliatory business reason. The court gave a detailed discussion of the evidence which led to its finding. Burasco had informed Trent of another job opening at VEA and asked her to apply for the position, but Trent failed to do so. After her termination, Trent used VEA facilities and meter books, with Dohlen's permission, to work on an outside project. Trent was also hired for temporary work at VEA with Dohlen's permission. The court found that these facts lent weight to Dohlen's testimony that he terminated her solely because her employment as a meter reader created an unacceptable risk to VEA given her relationship with the outside reader.

The court also noted that it carefully weighed Dohlen's testimony, the only direct evidence offered by either party concerning Trent's termination. The court stated that "Dohlen's testimony created the striking and deep impression upon the Court that Dohlen was being

entirely and completely truthful when he testified that he absolutely did not consider Trent's complaint . . . in making the decision to terminate her."

When findings are based on trial court determinations regarding the credibility of witnesses, even greater deference is given to the court's findings, "for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (citation omitted).

> [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Id. (citations omitted). The Court also noted, "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573-74. We cannot say that the trial judge's conclusions are clearly erroneous.

CONCLUSION

Therefore, the judgment of the district court is affirmed.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTORIA L. TRENT, aka VICTORIA L. WINEBARGER, *Plaintiff-Appellant,* v. VALLEY ELECTRIC ASSOCIATION, INC.; RICHARD BURASCO; ROSS DOHLEN, *Defendants-Appellees.*	No. 93-15458 D.C. No. CV-92-00617 LDG OPINION

Appeal from the United States District Court
for the District of Nevada
Lloyd D. George, District Judge, Presiding

Submitted November 17, 1994*
San Francisco, California

Filed December 1, 1994

Before: Donald P. Lay,** Harry Pregerson, and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Pregerson

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* The panel unanimously found this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

** The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

COUNSEL

Ian Christopherson, Burke & Christopherson, Las Vegas, Nevada, attorney for the plaintiff-appellant.

Renee R. Reuther, Jones, Jones, Close & Brown, Las Vegas, Nevada, attorney for the defendants-appellees.

OPINION

PREGERSON, Circuit Judge:

Victoria Trent appeals the district court's grant of partial summary judgment in favor of defendants on her retaliatory discharge claim under § 704 of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a) (1981). We reverse and remand.

BACKGROUND

On February 8, 1988, the Valley Electric Association ("VEA"), a rural public utility company, hired Victoria Trent to read residential electric meters. On July 20, 1988, she attended a mandatory safety meeting. VEA hired Ruralite Services, Inc. to conduct the meeting. During his presentation, the instructor from Ruralite used foul language and made a series of sexually offensive references. These included a description of the sexual experiences of linemen at a Nevada brothel. Trent was the only woman present at the lecture.

Trent complained about the offensive remarks to Richard Burasco, VEA's office manager. On August 19, 1988, Burasco asked Trent to put her complaint in writing. She submitted a written report to Ross Dohlen, VEA's

general manager and later spoke with him about the safety meeting incident. When Trent remarked she "was not one of the boys," Dohlen replied that "for some purposes" she was. On August 31, 1988, Dohlen wrote to Ruralite complaining about the lecturer's offensive comments. On September 19, 1988, VEA fired Trent.

ANALYSIS

We review a grant of summary judgment de novo. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). Trent challenges her dismissal under the "opposition clause" of § 704 of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a) (1981). The clause makes it illegal for an employer to discriminate against an employee where the employee "has opposed any practice made an unlawful employment practice by this subchapter. . . . " Courts have interpreted "unlawful employment practices" to include a panoply of actions involving discrimination and sexual harassment.

To succeed on a retaliation claim, Trent must first establish a prima facie case. *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1513 (9th Cir. 1989). She must demonstrate (1) that she was engaging in a protected activity, (2) that she suffered an adverse employment decision, and (3) that there was a causal link between her activity and the employment decision. *Id.* at 1513-14.

In granting summary judgment in favor of VEA, the district court concluded that Trent failed as a matter of law to establish the first element of a prima facie case. We disagree.

The district court, relying on *Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir. 1978), found that because Trent complained about the practice of an outside consultant, not her employer, she was not protesting an "unlawful employment practice" under Title VII, and thus her conduct did not constitute a "protected activity." In *Silver*, the plaintiff was fired after confronting a co-employee and protesting a racially offensive remark he had made about her trainee. Her protest was directed solely to the employee who made the offensive remark. We said that "[t]he opposition must be directed at an unlawful employment practice of an employer, not an act of discrimination by a private individual." *Id.* at 141.

Whether Ruralite is a "private individual" is questionable. VEA did, in fact, hire Ruralite to train its employees, a function often carried out by company supervisors. We have held that when an employee protests the actions of a supervisor such opposition is a "protected activity." *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1014 (9th Cir. 1983).[1]

But we need not delve into the subject whether "protected activity" under Title VII includes an employee's

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[1] At least one court has held employers liable for acts of outside contractors under Title VII. *See People v. Hamilton*, 42 FEP Cases 1069 (N.Y. Sup. Ct. 1986) (employer liable when it failed to discharge an independent polygraph operator who sexually harassed employees); *see also Waltman v. Int'l Paper Co.*, 875 F.2d 468 (5th Cir. 1989) (triable issue whether employer took prompt remedial action in response to allegations of sexual harassment, some involving employees of independent contractor).

protest to her employer of an outside consultant's conduct. As we first explained in *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978), a plaintiff does not need to prove that the employment practice at issue was in fact unlawful under Title VII. To establish the first element of a prima facie case, Trent must only show that she had a "reasonable belief" that the employment practice she protested was prohibited under Title VII. *Id.* at 696; *see also E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d at 1013 ("opposition clause protection will be accorded whenever the [employee's] opposition is based on a 'reasonable belief' that the employer has engaged in an unlawful employment practice"). Most courts agree. *See Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1137-38 (5th Cir. 1981) (employee belief that conduct being opposed was discriminatory must only be "reasonable") (quoting *Hearth v. Metropolitan Transit Commission*, 436 F.Supp. 685, 688-89 (D.Minn. 1977)), *cert. denied*, 455 U.S. 1000 (1982); *Sisco v. J.S. Alberici Construction Co.*, 655 F.2d 146, 150 (8th Cir. 1981) (same), *cert. denied*, 455 U.S. 976 (1982); *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045-46 (7th Cir. 1980) (employee need only have a "reasonable belief" that the practice she opposes is unlawful); *Hearth*, 436 F.Supp. at 688-89 (if employee "reasonably believes" that discrimination exists, his or her protest is a protest of an unlawful employment practice under Title VII); *see also* Barbara Lindemann & David D. Kadue, *Sexual Harassment in Employment Law* 280 (1992) ("The EEOC and most courts have stated that § 704(a) protects opposition [to an employment practice] so long as the employee has a reasonable and good-faith

belief that the practice opposed constituted a violation of Title VII").

This reading of Title VII is consistent with its purpose to eliminate discrimination in employment. To find that Title VII's opposition clause only protects those who can prove that the conduct at issue is actually unlawful "[w]ould not only chill the legitimate assertion of employee rights under Title VII but would tend to force employees to file formal charges rather than seek conciliation or informal adjustment of grievances." *Sias*, 588 F.2d at 695.

Trent need only show that she had a reasonable belief that it was unlawful under Title VII for her to be subjected to a series of sexually offensive remarks at a seminar her employer required her to attend. The record in this case could support a finding that Trent had such a reasonable belief. After all, Trent was obligated to attend the safety lecture to learn about an essential aspect of her job. She certainly would be justified in believing that Title VII would protect her from the offensive remarks she endured while attending the meeting.

For the reasons set forth above, we conclude that the record before the district court on summary judgment would support a finding that Trent engaged in a "protected activity" – the first element of a prima facie case of retaliatory discharge.[2] The district court erred when it

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[2] We do not decide whether or not summary judgment would be appropriate on the second or third elements of Trent's prima facie case.

found to the contrary. Accordingly, we reverse and remand.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VICTORIA L. TRENT, a/k/a VICTORIA L. WINEBARGER Plaintiff-Appellant, v. VALLEY ELECTRIC ASSOCIATION, INC., RICHARD BURASCO; ROSS DOHLEN; KENNETH TANKERSLEY; I C "OAKEY" SPEARS; HARRY JOHNSON; DAN PETERSON, DOES XXI – XXX, Defendants-Appellees.	No. 95-16722 D.C. No. CV-92-00617-LDG (LRL) MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Lloyd D. George, District Judge, Presiding

Argued and Submitted December 9, 1996
San Francisco, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: FLETCHER, WIGGINS, and T. NELSON, Circuit Judges.

Victoria Trent ("Trent") appeals an adverse judgment following a bench trial in her action for retaliatory discharge under § 704 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), against her employer, the Valley Electric Association ("VEA"). The district court found that Trent failed to prove that she was discharged in retaliation for her protected activity and entered final judgment for VEA. In so ruling, the district court improperly disregarded Trent's circumstantial evidence of retaliation. We therefore remand for a new trial.

A. Standard of Review

We review the judge's findings of fact under the clearly erroneous standard, *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1427 (9th Cir. 1996). An appellate court must accept the lower court's findings of fact unless upon review the appellate court is left with the definite and firm conviction that a mistake has been committed. *Sawyer v. Whitely*, 505 U.S. 333, 346 n. 14 (1992). We review the district court's conclusions of law de novo. *Magnuson*, 85 F.3d at 1427.

B. Facts

Trent worked for VEA from February 8, 1988 to September 19, 1988. She alleges that she was terminated by VEA because she complained about inappropriate remarks, including foul language and a series of sexually

offensive references, made at a July 20, 1988 safety meeting conducted by Ruralite Services, Inc., a company often hired by VEA to train its employees. She was required to attend this meeting.

VEA is an electric utility company providing electrical services to small towns and rural areas in Nevada, including the Pahrump Valley, a remote area north of Las Vegas. VEA's revenues are derived from the payment of monthly power bills by its customers. VEA must obtain readings from each customer's power meter in order to generate its bills. Since 1985, VEA has employed Jack Winebarger ("Winebarger"), as an independent contractor to read the 3500 meters in the Pahrump Valley each month. Although he generally employs 1-3 employees to help him read the meters, he is the only person who knows the location of all the meters. In 1987 one of VEA's employees, Mark Hatfield, who had been working with Winebarger to read the meters as VEA's in-house reader, was injured. Trent was hired to replace Hatfield as VEA's in-house meter reader; she already knew the location of many of the meters because she had read them while working for Winebarger as one of his contract employees. Trent and Winebarger had lived together since the 1980's, a fact known to VEA at the time she was hired. She was the first woman ever employed by VEA in other than clerical jobs. In addition to meter reading, she had other substantial duties.

Trent worked for VEA for seven months. During that time she received good employment evaluations. On August 19, 1988, she complained to her immediate supervisor, Richard Burasco, about inappropriate sexual remarks and jokes that were made at the July 20 safety

meeting that she had attended. Burasco asked her to put her account of the incident and corresponding complaints in writing so that formal documentation could be forwarded to VEA's general manager Ross Dohlen. Trent did so the next day, and briefly discussed the matter with Dohlen.

On September 19, 1988, after the meters were read for that month's billing cycle, Trent was fired. Burasco advised Trent that she would have to resign or she would be terminated. She resigned, then retracted her resignation. She was terminated over the protest of Burasco, on orders from Dohlen, who asserted that her residency with Winebarger created an unacceptable risk to VEA. After resigning, Trent met directly with Dohlen and asked to be reinstated. He refused. On September 30, 1988, Trent attended a meeting of VEA's Board of Directors and sought reinstatement. At that meeting, Dohlen advised the Board that he believed Trent's employment presented VEA with an unnecessary and unacceptable risk. In spite of the presence of 20 consumers who protested her termination and the fact that the directors were told that she was a model employee, she was not reinstated.

Upon hearing of Trent's termination, Winebarger offered to give up his meter-reading franchise so that Trent could retain her job, and its attendant benefits. VEA refused his offer. In fact, on September 7, 1988 it had signed its first written contract with Winebarger, one that contained no protection against the threat that Dohlen felt was unacceptable – Winebarger's monopoly on meter-reading expertise.

VEA replaced Trent with another in-house meter reader, Randy Nolan. For approximately 10 months he read a rotating selection of the meter routes in the Pahrump Valley. His position was then phased out, because he read the meters too slowly, and Winebarger regained sole responsibility for reading the meters. When Trent was hired in 1988, VEA had begun a mapping program that would have documented the location of the meters. This map was incomplete as of 1994.

C. Analysis

After Trent's presentation of her case in chief the district court granted VEA's motion for judgment on partial findings pursuant to Rule 52(c) of the Federal Rules of Civil Procedure. The court concluded that Trent had failed to maintain her burden of proof on an essential element of her claim: that there was a causal link between her complaint about the safety meeting and Dohlen's decision to terminate her. Instead, the court found that VEA had terminated Trent for a legitimate, non-retaliatory reason, that control of VEA's meter reading duties was unacceptably concentrated in one household, and entered final judgment in favor of VEA.

After a thorough review of the record in its entirety, we conclude that at the juncture that the district court dismissed the case, were the circumstantial evidence considered by the court. Trent's evidence of retaliatory firing would seem to compel a judgment in her favor. However, the record is incomplete as a result of the judgment on partial findings, VEA never had the opportunity to put on its case. On retrial, Trent's evidence, both direct and

circumstantial, must be considered by the court and balanced against whatever evidence VEA may adduce.

In Title VII retaliation cases, once the plaintiff has established a prima facie case,[1] the burden of production shifts to the defendant to articulate a legitimate, non-retaliatory explanation for its decision. *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987). Once the defendant meets this burden, the burden of production then shifts back to the plaintiff to show that the alleged explanation is a pretext for impermissible retaliation. *Id.* Since we are reviewing a retaliatory discharge claim after a bench trial, the critical issue is whether the district court erred in holding that the appellant had not met her burden of proving that a retaliatory reason more likely than not motivated VEA. *Miller v. Fairchild industries, Inc.*, 885 F.2d 498, 504 n.4, *cert. denied*, 494 U.S. 1056 (1990) (citing *U.S. Postal Service B. of Governors v. Aikins*, 460 U.S. 711, 714 (1982)).

This is not a case of our simply disagreeing with the district court as to the way the evidence should be weighted. Rather, the district court appeared to be under the misimpression that to prevail Trent had to present

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[1] In *Trent v. Valley Elec. Assoc.*, 41 F.3d 524, 567 (9th Cir. 1994) (citing *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d. at 1013), this court held that Trent's complaint about having to listen to sexually offensive remarks at a mandatory training seminar conducted by an outside consultant constituted protected activity because she showed a reasonable belief that the employment practice she protested was prohibited under Title VII.

direct evidence that VEA's motive for firing her was discrimination and he also discounted considerable circumstantial evidence as irrelevant. The court's error is evidenced by its finding that Tent failed to present "*direct evidence* that Dohlen possessed any improper animus when he decided to terminate Trent." Findings at 8 (emphasis added, and its several remarks that certain evidence was irrelevant. Direct evidence is not required. Discrimination may also be shown indirectly, by showing through circumstantial evidence that the employer's proffered explanation is pretextual. *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346, 1354 (9th Cir. 1984) (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). Indeed, pretext is almost always proved by indirect evidence.

We do require that circumstantial evidence of pretext be specific and substantial, consisting of more than a mere refutation of the employer's legitimate reason and that the discriminatory reason be the cause of the firing. *Wallis v. J.R. Simplot, Co.*, 26 F.3d 885, 890 (9th Cir. 1994) (citing *Steckl v. Motorola Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)). Trent's evidence was specific and it was substantial.

Nothing in the record supports VEA except the self-serving statement that it needed a reader independent of Winebarger. All of their actions were to the contrary. "[R]ejection of the defendant's profffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and . . . no additional proof of discrimination is *required.*" *St. Mary's Honor Center v. Hicks*, 509 U.S. 511 (1993) (quotation omitted, emphasis in

original). With this in mind we have examined all of the evidence in the record.

Dohlen and Burasco changed their testimony after the first remand from this court. The district court believed that they were essentially truthful witnesses and that they simply had been wrong in their first affidavits when they asserted at trial that their decision to fire Trent was made in mid-August, rather than mid-September. We must accept its finding in this regard.

Causation may be inferred from evidence showing that the adverse action occurred shortly after the protected activity. *See Miller,* 885 F.2d at 505. Trent made her complaint in mid-August of 1988. She was fired in mid-September. Crediting the district court's determination that Dohlen and Burasco were truthful in asserting that the decision to fire Trent was made the day before she was fired, the two events were still in close enough proximity to infer a causal relationship between Trent's complaint and her termination. This change in timing does not alter the strength of Trent's argument as to the cause of her firing. She was fired the day after the monthly meter reading cycle was completed in the Pahrump Valley, September 18, 1988. ER, tab 5 (letter to NERC, April 7, 1989, signed by both Dohlen and Burasco). It is consistent with the evidence that VEA wanted her competent services until that essential chore was completed: "It was after that work was completed that the action was taken to terminate Ms. Trent. It was not taken earlier as it would have hindered the meter reading process as it would have been one employee short." *Id.*

Causation may also be inferred from the fact that management personnel engaging in an adverse employment decision are aware that the employee has engaged in protected conduct. *Id.* Both Dohlen and Burasco testified at trial that they were aware that Trent had made her complaint by August 19, 1988, when her written complaint was submitted, one month before she was fired.

Pretext can be shown by the inconsistent application of employer policy, *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 797 (9th Cir. 1982). VEA management was aware of Trent's relationship with Winebarger before she was hired. In fact, she was hired in part because she already knew the location of many of the meters in Pahrump Valley as a result of accompanying Winebarger on his routs, and eventually in reading the meters as his contract employee. At trial, VEA offered absolutely no reason why this asset suddenly turned into an unacceptable liability.

Trent testified that Burasco knew of her relationship with Winebarger when he hired her in February, 1988, TR 191, and that he discussed VEA's nepotism policy with both Trent and Winebarger at that time, TR 199, but did not believe their relationship would be a problem under the policy unless they married. Burasco, himself, testified that he discussed this with Dohlen at that time, "[o]r he wouldn't have allowed me to hire." TR 201. Trent, too, testified that Burasco specifically told her when she was hired that her relationship with Winebarger had been discussed prior to VEA offering her the position and that it would not be a problem. TR 262. Neither Burasco or any other witness denied this.

Burasco also testified that Trent was a good employee and that he was concerned when he fired her because "I think we live in a day and age that you don't just fire a good employee that is performing their job." TR 217. Herb Cochrell, VEA's computer service coordinator and payroll administrator, testified that in the fourteen years that he had worked at VEA no employees had ever been terminated whose work had been satisfactory. TR 71.

No testimony was offered at trial to explain why Trent's relationship with Winebarger suddenly became a problem in September of 1988. Dohlen simply testified that although Trent was a good employee, TR 117; TR 148, it "became apparent in August of 1988" that her relationship with Winebarger presented an unacceptable risk to VEA. Dohlen identified *no* incident or incidents that triggered this decision. TR 111. He stated that he considered no alternatives to termination, TR 117, or made any other offer of employment to Trent at VEA, TR 143, that there were no women employed at VEA in non-clerical positions, and that Trent was the only employee that he terminated at VEA whose work was satisfactory, TR 117.

Dohlen also testified that Trent's six-month performance evaluation, completed two to three weeks prior to her complaint, made no notation of any concerns with respect to covering VEA's meter reading responsibilities in the Pahrump Valley, TR 139.

Burasco testified that he and Dohlen had represented to Mr. De Jesus, the Equal Opportunity Representative for the state of Nevada, that the relationship between Winebarger and Trent had not been an issue in her termination and that it was known to VEA before and during her

employment. TR 219; ER Tab 5. He stated that he believed that Dohlen would not hire her back because "once he makes a decision about something, he normally didn't reverse it." TR 229.

Trent's uncontested testimony was that meter reading was only a small part of her job (4 days per month); her other duties consisted of collections, disconnecting and connecting meters, and ordering office supplies. She stated that she trained her replacement for VEA, that she continued to read the meters with Winebarger until 1991, and that VEA did not maintain any in-house capability for meter reading after her termination, but that in fact, Winebarger continued to retain all meter reading expertise. TR 265-267. She was not offered any other position at VEA.

VEA's conduct was inconsistent, too, in its supposed commitment to eliminating their vulnerability: they made no contractual provisions to protect themselves; they did not maintain an in-house meter-reading capability; and they did not complete a mapping project that would have documented the locations of the meters in question.

Winebarger testified that at the time of trial, all meters were being read by him and that VEA had no in-house readers. TR 153. He testified that the in-house employee hired to replace Trent stopped reading meters after less than a year because he was too slow. TR 156. He testified that immediately after Trent was fired, he offered to Dohlen to quit his contract if Dohlen would reinstate Trent because she needed the job to support her kids, but that Dohlen "had already made up his mind." TR 159. He testified that Burasco told him that Trent was supposed to

have been fired a month before she was actually fired (which would have been mid-August, immediately after Trent complained about the remarks made at the safety meeting). TR 160. And he testified that nothing in the contract that he signed with VEA on September 7, 1988 protected VEA from any of the dangers that they claimed motivated Trent's dismissal on the 19th, such as a guarantee that Winebarger would train a replacement should he decide to terminate the agreement. TR 172.

Burasco testified that VEA was developing a mapping system which would have documented the location of the meters, that this project was in progress in 1988 when Trent was hired, that Dohlen knew about it, and that it still wasn't completed in 1994. TR 236-237.

VEA's assertion that its main concern was maintaining an in-house meter-reading capability, is undermined by the fact that they knew of her relationship with Winebarger before her hire in February, did not identify any changed circumstance that made such a relationship a threat in September, did not maintain such a capability after here termination, did not negotiate any protection from Winebarger's monopoly of that information in their September, 1988 contract (their first written contract with him), did not agree to take the project entirely in-house when Winebarger offered to give up his franchise, did not complete their internal mapping project that would document the location of the meters, and did not offer Trent, an admitted good employee, any alternative employment despite the fact that meter-reading was only a small part of her job description. The evidence adduced to the moment of dismissal leads us to conclude that no inference was possible at that juncture other than that VEA

used Trent's relationship with Winebarger as a pretext for termination in retaliation for Trent's August, 1988 complaint.

D. Conclusion

The district court concluded that "[w]hatever risk Valley Electric assumed when it hired Trent, Dohlen's testimony established that he reconsidered that risk and decided that its continued existence was unacceptable and needed to be reduced." However, not one scintilla of evidence in the record suggests that Dohlen's "reconsideration" was prompted by any event, internal or external, other than Trent's complaint. Trent, by contrast, presented considerable evidence to show that VEA did not seriously act to protect itself against the supposedly unacceptable risk. The district court, had it considered the circumstantial as well as the direct evidence, might well have concluded differently. A new trial complete as to the evidence from both sides with both direct and circumstantial evidence properly weighed in the balance is required.

REVERSED and REMANDED for a new trial.

UNITED-STATES DISTRICT COURT

DISTRICT OF NEVADA

VICTORIA L. TRENT, a.k.a. VICTORIA CARROLL,[1] Plaintiff, v. VALLEY ELECTRIC ASSOCIATION, Defendant.	Case No. CV-S-92-617-LDG (LRL) **OPINION** (Filed June 18, 1988)

The parties tried this matter to the Court on February 4 and 5, 1998. The following constitutes this Court's findings of fact and conclusions of law based upon the evidence received at this trial.

On September 19, 1988, Ross Dohlen, then general manager of Defendant Valley Electric Association, terminated Plaintiff Victoria Trent, Valley Electric's in-house meter reader. Dohlen has testified that the only reason he terminated Trent was for the legitimate, business reason of reducing Valley Electric's vulnerability regarding the reading of meters. When Dohlen made the decision to terminate Trent, however, he was aware that she had recently engaged in protected activity. Trent asserts a claim that she was terminated in retaliation for engaging in the protected activity. As required for resolution of a

[1] At trial, Plaintiff testified that she has re-married. Nevertheless, for clarity and consistency, the Court will refer to Plaintiff as Trent.

Title VII retaliation claim, the Court must determine whether Trent showed that it is more likely than not that Valley Electric's stated legitimate, non-retaliatory reason for terminating her was a pretext to retaliate against her for engaging in protected activity. In the specific context of this case, this requires a determination whether it is more likely than not that Dohlen lied to this Court when he testified that he absolutely did not consider Trent's protected activity in making his decision to terminate her.

On February 8, 1988, Richard Burasco, the office manager of Valley Electric, hired Trent as Valley Electric's in-house meter reader. Dohlen approved this hire. At that time, Valley Electric divided its users' electric meters into sixteen "books." Each book represented a different route, with each route having a differing number of meters. Typically, each book of meters could be read in one or two days. Each month, the in-house reader would read two of Valley Electric's sixteen books. The remaining fourteen books were read by an "outside" meter reader, Jack Winebarger. At the time Trent was hired, Winebarger read meters pursuant to an oral contract with Valley Electric. This system permitted the in-house reader to cycle through all sixteen books every eight months, ensuring that the in-house reader had a working knowledge of the locations of all meters. The system also attempted to ensure that Valley Electric had at least one employee on its staff that was knowledgeable regarding the location of all meters.

The parties have not disputed that, for Valley Electric, reading meters is a critical business function that must be performed monthly. There is also no dispute that Valley Electric specifically employed Trent as an in-house

reader so that Valley Electric would have an employee with knowledge regarding the reading and location of meters. Further, the parties do not dispute that Valley Electric hired Trent knowing that she was living with Winebarger. During a meeting with Burasco prior to Trent's hire, Winebarger and Trent specifically asked whether their personal relationship would be a problem. Burasco responded that Valley Electric's nepotism clause, which precluded hiring the spouse of an employee, was not a problem as Jack was not an employee of Valley Electric. Rather, Burasco stated that the only problem he perceived was ensuring that Trent understood she would not be working for Winebarger, but would be working for Valley Electric. At that time, neither Burasco nor Dohlen perceived that placing all meter reading duties in one household created an increased risk to Valley Electric's meter reading function.

On July 20, 1988, Valley Electric required Trent to attend, and she did attend, a safety meeting conducted by Ruralite Services, Inc. During this meeting, the Ruralite representative made sexually offensive remarks. On August 18, Trent orally complained to Burasco, who was her direct supervisor, of the Ruralite representative's remarks. There is no longer any dispute that, in making this complaint, Trent engaged in a protected activity for which she could not be terminated.

Burasco treated Trent's complaint of improper language and conduct as very serious. He asked her to chronicle her complaint in writing. He also briefly informed Dohlen of Trent's complaint against Ruralite's representative. As requested by Burasco, Trent reduced her complaint to writing. Dohlen received this written

complaint the next day. Dohlen also treated the complaint as very serious. He interviewed at least one other employee who attended the safety meeting, confirming that the Ruralite representative had made offensive remarks. On August 31, Dohlen wrote a letter to Ruralite complaining of the offensive language used by its representative during the required safety meeting. Subsequent to Trent's complaint and Dohlen's letter in response to that complaint, Ruralite's representatives have not engaged in the inappropriate conduct of which Trent complained.

Sometime during late July or early August, Burasco evaluated Trent's performance. In the numerous categories reviewed by Burasco, he rated Trent as either satisfactory or excellent. Her overall rating approached exceptional. Pursuant to Dohlen's general procedure, he reviewed the evaluation. Dohlen did not modify the evaluation in any manner. Nothing in this evaluation suggests that Dohlen was concerned that, because Trent lived in the same household as Winebarger, Valley Electric's meter reading function was subject to an increased risk. Burasco reviewed the evaluation with Trent on August 18.

In August or very early September, Valley Electric began negotiations with Winebarger with the intent of entering into a written contract. On September 7, 1988 Valley Electric and Winebarger signed the written contract. The written contract did not contain any provision requiring Winebarger to train a replacement for himself.

Finally, Dohlen testified that sometime in the latter part of August or early part of September, he began to be

concerned that both of Valley Electric's meter readers resided in the same household. Having both the inside and outside readers residing in the same house, he felt, frustrated the purpose of having an in-house reader. If Winebarger stopped reading meters for some reason, Trent might also stop reading meters. For example, if Winebarger and Trent decided to leave the Pahrump Valley, Valley Electric would lose both of its meter readers at the same time. The Court also received some evidence that, prior to this trial, a Valley Electric employee was killed in an automobile accident. Obviously, having both meter readers residing in one household increases the risk that both employees would be involved in a single accident. While such events seem remote, and though we tend to avoid considering such unpleasant thoughts, the Court notes that prudent estate planning requires that couples address and plan for the distinct and real possibility that they will pass away at the same time. Likewise, a business must also recognize that the simultaneous loss of a couple, for any reason, is a distinct and real possibility and must assure that such an event would not disrupt a critical business function. For Valley Electric, having both readers residing in one household created an increased risk to its critical function of reading meters.

Dohlen did not identify any specific event causing him to be concerned that Trent and Winebarger might both stop reading meters. Indeed, he expressly stated that no incident or event caused him to start considering this vulnerability. Dohlen testified that he considered the matter for several weeks, and finally came to a decision that

the situation must be corrected, and that it must be corrected by terminating Trent. The protection of Valley Electric's critical meter reading function is a legitimate business reason for the termination of Trent. As noted below, however, Valley Electric's attention to this function was, at best, inconsistent.

Dohlen admits that he did not consider any alternatives, other than terminating Trent, to eliminating the risk caused by having both meter readers residing in one household. Valley Electric, however, did not have any other positions to which Trent could be transferred at the time she was terminated due to the small size of the organization. Trent did not present any evidence that, in September 1988, Valley Electric could have transferred her to another position. At best, the evidence suggests that, apart from Trent's replacement, Valley Electric did not hire any other employees for at least six months.

After making his decision, Dohlen instructed Burasco to terminate Trent. Burasco disagreed with the decision to terminate Trent and argued with Dohlen against the termination. As he testified at trial, he was selfish and he did not want to lose Trent because she was a good employee. Burasco also admitted a concern that the meters had not yet been read for September. After recognizing that Dohlen would not change his mind, and after waiting for all meters to be read, Burasco terminated Trent on Monday, September 19, 1988. He informed her that she was terminated because Dohlen was concerned with having both the in-house and outside meter reader living in the same household. On the following day, Trent directly asked Dohlen to reconsider his decision but he declined. Sometime in the following days, Winebarger

offered to resign as the outside meter reader so that Trent could continue to work as the in-house reader. Dohlen also rejected this offer. After her termination, Trent appealed to the Board of Directors. Despite community support for Trent, the Board upheld Dohlen's decision.

Both Trent and Burasco testified that they believed Dohlen would not rehire her, though neither Trent nor Burasco ever directly asked Dohlen whether he would permit Trent to be hired in another position. To some extent this belief appears both unfounded and incorrect. Several months after Trent's termination, Burasco informed her of a specific job opening at Valley Electric and asked if she would be applying. Trent responded that she would consider applying. Although Trent took an application form, she did not submit a written application or make a verbal request for the job. Thus, while both Trent and Burasco testified that they believed that she could not be rehired, they also conceded to engaging in actions indicating they recognized and assumed that Trent could be re-hired for other positions at Valley Electric.

In addition, the Court also received evidence that, following her termination, Trent obtained a temporary job for the Yucca Mountain project. Trent recognized that she could most efficiently perform this temporary job by using Valley Electric's facilities and meter books, which she did with Dohlen's permission. Trent also was hired and performed some temporary work for Valley Electric itself as the utility began its efforts to map its meters. Dohlen also approved Trent performing this temporary work. This further suggests that Dohlen would allow the

rehire of Trent and further indicates that she was incorrect in assuming that she would not be rehired.

The only issue before this Court is whether Dohlen's (and thus Valley Electric's) stated reason for terminating Trent was a pretext for retaliation. The parties do not dispute that Trent made a prima facie showing of retaliation for engaging in protected activity or that protecting the meter reading is a legitimate business function for Valley Electric, which it could protect. It has previously been determined that Trent engaged in protected activity when she complained to Valley Electric of inappropriate remarks made at the Ruralite meeting that she was required to attend. As this protected activity occurred shortly before the decision was made to terminate her, a presumption arises that the decision to terminate was made in response to the protected activity. In response, Valley Electric articulated a legitimate, nonretaliatory business reason for terminating Trent. Valley Electric needed to terminate Trent to protect it's [sic] meter reading, a critical business function. Accordingly, the Court must resolve whether Trent has shown, by a preponderance of the evidence, that Valley Electric's stated explanation for terminating her was pretext to cover the fact that it improperly retaliated against her protected activity by terminating her.

Before proceeding further, the Court must first reject Trent's argument that the Ninth Circuit has mandated that judgment must be entered in her favor, even if the Court finds that Dohlen truthfully testified that his decision to terminate Trent was not in retaliation for her protected activity. The argument is absurd. Trent does not dispute that Dohlen, and only Dohlen, made the decision

to terminate her. Dohlen testified at trial, in absolute terms, that he did not consider Trent's protected activity when he decided to terminate her. Accordingly, the question of whether Dohlen retaliated against Trent and the question whether Dohlen testified truthfully about whether he retaliated against Trent must be resolved consistent with each other. If this Court finds that Dohlen retaliated against Trent, the Court is required to find that Dohlen lied about his decision to terminate Trent. Conversely, if this Court finds that Dohlen testified truthfully concerning Trent's termination, this Court is also required to find that Dohlen did not retaliate against Trent. This Court would abuse its discretion and commit clear error by finding that Dohlen truthfully testified that he did not retaliate against Trent yet make an inconsistent finding that Dohlen retaliated against Trent.

The Court would note, however, that Trent need only show by a preponderance of the evidence, using direct evidence or specific and substantial[2] circumstantial evidence, that Dohlen lied. That is, Trent must only establish that it is more likely than not that, contrary to Dohlen's testimony to this Court, he fired her because she engaged in protected activity. In addition, the Court would note that it must look to all of the evidence in determining whether Dohlen testified truthfully or not regarding his reasons for terminating Trent. The credibility of Dohlen's

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[2] As noted by the Ninth Circuit in its opinion on remand, courts "do require that circumstantial evidence of pretext be specific and substantial, consisting of more than a mere refutation of the employer's legitimate reason and that the discriminatory reason be the cause of the firing." *Trent v. Valley Electric Assoc.*, No. 96-16722, pg 7 (9th Cir., April 18, 1997).

testimony must be determined in light of all relevant direct and circumstantial evidence that Trent offered showing that, contrary to his testimony, he retaliated against her. The credibility of his testimony must also be determined in light of all relevant evidence, both direct and circumstantial, that was offered by Valley Electric. This Court can also consider Dohlen's testimony itself in deciding whether Trent has met her burden of showing that he retaliated. And, perhaps obviously, this Court can certainly consider Dohlen's demeanor and manner while testifying.

Next, the Court must address the Ninth Circuit's suggestion that this Court was "under the misimpression that to prevail Trent had to present *direct* evidence that VEA's motive for firing her was discrimination." *Trent v. Valley Electric Assoc.*, No. 96-16722, pg 6. (9th Cir., April 18, 1997). Interestingly, it would appear that the sole basis for the Ninth Circuit's supposition is the otherwise unremarkable finding by this Court, in its decision following the first trial, that Trent had not presented any direct evidence of retaliation. That this straightforward finding was considered suspect is interesting since Trent not only failed to present any direct evidence but she conceded that she lacked any direct evidence of retaliation. At no time did this Court suggest or imply that, because Trent lacked direct evidence of retaliation, this Court felt precluded from determining whether she had provided specific and substantial circumstantial evidence of retaliation. Rather, this Court's finding and observation that Trent lacked direct evidence was nothing more than a simple

finding that, indeed, Trent lacked direct evidence. Further, the Court did not consider the lack of direct evidence as unusual or suspect. Having presided over numerous discrimination trials, the Court was and is well aware that it is the rare case in which direct evidence of an improper animus will exist. The Court was, and is, well aware of its duty and obligation to consider bath relevant direct evidence, if any is available to be offered and is offered into evidence, and relevant specific and substantial circumstantial evidence when exercising its fact-finding duties.

Nevertheless, to ensure that no further confusion occurs, the Court expressly notes that Trent again failed to present any direct evidence of retaliation in this second trial. As in the previous trial, the Court does not find this failure to be unusual or suggestive that Trent's claim lacks merit. Rather, the lack of direct evidence of retaliation has little, if any relative weight in favor of either party: the lack of direct evidence does little to tip the scales in favor of either Trent or Valley Electric. In a retaliation case such as this, the lack of direct evidence permits an inference that the decision-maker was able to effectively conceal his or her improper animus for terminating the employee. However, the Court would abuse its discretion if it failed to acknowledge that the lack of direct evidence of an improper animus can also result from the very fact that the decision-maker actually lacked an improper animus. That is, the lack of direct evidence also permits an equally persuasive but mutually exclusive inference that the decision-maker lacked improper animus.

The Court would note that neither party offered any evidence suggesting that, as a general rule, the lack of direct evidence of improper animus tends to indicate that either of these two permissible inferences is more probable and should be given greater weight. Neither did either party offer specific, relevant evidence suggesting that one inference or the other should be given greater weight. Accordingly, as both inferences that can be drawn from the lack of evidence are equally persuasive and mutually exclusive, the Court finds that the lack of direct evidence is ambiguous and has little, if any, relative weight in favor of either party.

The Court also expressly recognizes that this lack of direct evidence of retaliation does not end the Court's fact-finding duties. Rather, this Court's fact-finding duties require the Court to look to and determine whether Trent offered specific and substantial circumstantial evidence of retaliation. The Court will weigh such evidence favoring Trent against any and all direct and specific circumstantial evidence favoring Valley Electric. This the Court has done, and now makes a sincere effort to discuss its findings and analysis as to the evidence, direct and circumstantial, offered by Trent and Valley Electric.

In attempting to fully address these findings, the Court must note the Ninth Circuit's suggestion that, in the prior trial, this Court "discounted considerable circumstantial evidence as irrelevant." To support this suggestion, the appellate court generally noted only that this Court made "several remarks that certain evidence was irrelevant." The appellate court did not specifically identify or discuss the evidence it suspected that this Court

improperly discounted. Neither did the circuit address this Court's discussion of that evidence. Having reviewed the prior memorandum decision, this Court could find only two items it expressly identified as irrelevant. These two items hardly seem to be a "considerable" amount of evidence. Indeed, the first item that this Court found irrelevant was not even evidence but was Trent's **argument** that her termination was pretextual because her relationship with Winebarger did not violate a literal construction of Valley Electric's nepotism clause. This argument would have been relevant if, as its legitimate, non-retaliatory business reason for terminating Trent, Valley Electric had articulated that her relationship with Winebarger violated the nepotism clause. Valley Electric, however, never offered or suggested that the nepotism clause was a legitimate, business reason for terminating Trent. Accordingly, Trent's **argument** was irrelevant. The Court notes, however, that evidence of the nepotism clause itself is relevant to showing whether Dohlen considered Trent's relationship to Winebarger as an unacceptable risk to Valley Electric.

Previously, this Court also found irrelevant Trent's abundance of evidence that she was a good employee, a fact that Valley Electric readily admitted. In retrospect, the Court notes it would have been better to characterize this evidence as ambiguous or equivocal, rather than irrelevant. That is, the evidence permits reasonable inferences of equal weight to be drawn in favor of each party.

Although both parties made clear at the outset of trial that Trent was a satisfactory employee, and although

the Court specifically informed the parties that it recognized this fact, nevertheless Trent again offered an abundance of evidence establishing that she was a satisfactory employee. For its part, several of Valley Electric's witnesses also testified that Trent was a good employee despite the Court's express acknowledgment of this fact. Most notably, Burasco argued against Trent's termination because he was selfish and did not want to lose an excellent employee.

As in the previous trial, Trent's ample abilities as an employee plainly show Valley Electric did not terminate her based on her performance, a fact not in dispute. Valley Electric, however, has not argued that substandard work performance was the legitimate business reason underlying Trent's termination. Indeed, Trent's satisfactory performance emphasizes that she was terminated for some reason other than her performance. Plainly, given that Trent complained of Ruralite's inappropriate conduct shortly before Dohlen decided to terminate her, the Court could draw a permissible inference that Valley Electric fired this satisfactory employee because she engaged in that protected activity. This inference, however, is not the only permissible inference that can be drawn from the evidence of Trent's satisfactory performance. Satisfactory employees can also be terminated for legitimate, non-retaliatory business reasons. As Trent testified at trial, she was recently laid off from Utah Power as it downsized and consolidated its customer service department, despite her presumably satisfactory performance. Thus, the second and equally persuasive inference that can be drawn from Trent's satisfactory job performance is that Dohlen considered the risk to Valley Electric sufficiently

substantial and unacceptable as to outweigh the loss of a valued employee.

The Court recognizes that Trent offered specific and substantial circumstantial evidence supporting her argument that Dohlen's stated reason for terminating her was pretext for retaliation. For example, the parties do not dispute that, at the time Trent was hired, Valley Electric knew that she lived with Winebarger. When Trent inquired whether her relationship with Winebarger would be a problem, Burasco responded that the relationship would not violate the nepotism clause since Winebarger was not technically employed by Valley Electric. The express purpose of hiring Trent was to reduce the Valley Electric's vulnerability in meter reading. Nevertheless, Burasco did not identify the impact of the relationship on that vulnerability. While Burasco identified the nepotism policy as a [sic] only possible reason Trent could not be hired, he considered only whether the relationship violated the literal terms of the policy. Burasco did not recognize the increased risk to a critical business function resulting from employing two people from one household, a possible underlying purpose of the nepotism policy. While Dohlen's testimony suggests that he later reconsidered that risk, the lack of concern at the time of hire is certainly evidence that Trent's subsequent termination was not in response to that risk, but was pretext for retaliation.[3] This is particularly true given that

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[3] In discussing the inconsistent application of employer policy, the Ninth Circuit also referred to Valley Electric's nepotism clause. The Court notes, however, that no evidence was received at either trial suggesting that Trent was terminated

the nepotism policy caused Burasco to consider the impact of Trent's relationship on her employability.

The Court also notes that, at trial, Dohlen specifically testified that no specific incident triggered his reconsideration of the risk to Valley Electric's meter reading function resulting from the relationship between Winebarger and Trent. The Court gives some weight in favor of Trent to the lack of an event triggering Dohlen's reconsideration. Certainly, the evidence that Dohlen was aware Trent engaged in protected activity, permits an inference that the protected activity may have been a triggering event. Nevertheless, every ongoing business concern involves many decisions and actions that are initiated without any apparent triggering event. Accordingly, Dohlen's assertion that no specific incident triggered his reconsideration of the risk to Valley Electric caused by Trent's employment weighs in favor of her.

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because her relationship violated the nepotism clause. The nepotism clause prohibited the employment of spouses by Valley Electric, regardless of whether their positions caused a potential conflict or risk to Valley Electric's business functions. As Burasco noted when Trent was hired, the nepotism clause was inapplicable since Winebarger was not employed by Valley Electric. Further, Valley Electric asserts it fired Trent because of a perceived risk to Valley Electric specifically resulting from her employment as an in-house meter reader. Thus, Valley Electric did not inconsistently apply the nepotism clause. Rather, and as noted by the Court, Valley Electric inconsistently considered the risk in having both meter readers living in the same household. Nevertheless, as noted in the text above, this inconsistent consideration of the risk created by hiring Trent is specific and substantial circumstantial evidence of a possible improper animus.

Characterized generously, Valley Electric's attention to its meter reading function has been inconsistent subsequent to Trent's termination. For example, for a period of about a year after Trent's termination, her replacement performed the in-house meter reading duties. At some point, however, he ceased consistently reading meters. The Court received conflicting explanations as to when and why the replacement quit reading meters. Winebarger suggested, while testifying for Trent, that the replacement was too slow and inconsistent at reading meters.

Valley Electric also began a project to map the location of all meters. Indeed, Trent was hired by Valley Electric to assist with this project. Valley Electric, however, does not appear to have followed through to the completion of this project. The Court would also note that, in September 1988, Valley Electric entered into a written contract with Winebarger, suggesting another of its efforts to protect the meter reading function. The written contract, however, was a less than perfect attempt to protect meter-reading as it did not even create an obligation for Winebarger to train his replacement. Overall, the Court finds that Valley Electric's inconsistent attention to meter reading is specific circumstantial evidence suggesting Trent may have been terminated in retaliation for her complaint.

The Court also notes that some of the evidence received at trial undermines, rather than supports, Trent's claim that she was terminated in retaliation for her complaint. For example, the Court notes that Dohlen's prompt and appropriate response to Trent's complaint lends weight to Valley Electric's assertion that Trent's

termination was not in retaliation for that complaint. Following the complaint, Dohlen quickly determined whether other employees had witnessed the same events. Upon determining that inappropriate comments and conduct had occurred, Dohlen wrote a letter to Ruralite complaining of the conduct. This response lends weight to a determination that Dohlen did not retaliate against Trent for complaining, but treated her complaint seriously and appropriately.[4]

In its prior opinion, the circuit court noted that Dohlen did not make any other offer of employment to Trent or consider an alternative position for Trent rather than termination. At this trial, however, Trent failed to identify any alternative position to which she could be transferred in September 1988. Further, Valley Electric offered evidence that no other position existed at that time. Other than Trent's replacement, Valley Electric did not hire another employee until approximately six months later.

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[4] The Court does note Trent's testimony that, when she presented her complaint to Dohlen, she stated that she was not just one of the guys. Trent's remark and express comparison to male workers suggests an inappropriate belief on her part that she could insist on a work environment free of sexually explicit comments while the male workers could not. To this remark, Trent alleges Dohlen responded that, in some ways, she was one of the guys. Trent suggests Dohlen meant that, like male workers, she was required to work in a hostile environment. Given the context of exchange and Dohlen's prompt attention to her complaint, however, it appears that he intended to correct Trent's incorrect belief, letting her know that, like Trent, all of the "guys" had a right to work in an environment free of offensive comments.

The Court received evidence that Dohlen did not specifically offer other employment to Trent. However, when an employment opening occurred at Valley Electric, Burasco asked Trent whether she would be applying for the job. In response, Trent did not affirmatively state she would apply for the job, but instead indicated that she would think about it. Trent took the application form, but never returned a completed application so that she could be considered for the job. As such, on at least one occasion, Valley Electric ensured that Trent was aware of a job opening and indicated that she could apply for the job.

Further, while Trent and Burasco testified that they believed Dohlen would not re-hire her, Trent did not offer any evidence in support of her belief. As in the prior trial, Burasco testified that he did not believe Dohlen would re-hire Trent because Dohlen did not reverse a decision once made. The Court would note, initially, a crucial distinction between whether Dohlen would re-hire Trent as a meter reader and whether he would re-hire her in another position. Burasco's testimony indicates only that Trent would not be re-hired as a meter reader. This evidence lends weight to a finding that Dohlen terminated Trent to protect meter reading, suggesting that he believed the risk caused by Trent's employment as a meter reader to be substantial.

To the extent Trent believed Dohlen would not allow her to be re-hired for another position, the record not only lacks any evidence supporting this belief but instead suggests the opposite conclusion is true. Subsequent to her termination, Trent was employed by Valley Electric in a temporary position with the approval of Dohlen. In addition, Dohlen permitted Trent to use Valley Electric's

facilities and books to perform her Yucca Mountain job, further evidence that Dohlen lacked any personal animosity against Trent. Finally, as noted above, Burasco ensured that Trent was aware of an opening and specifically asked her whether she would be applying for the job. Taken together, this favorable treatment of Trent lends weight to Dohlen's testimony that he terminated her solely because her employment as a meter reader created an unacceptable risk to Valley Electric given her relationship with the outside reader.

The Court notes Winebarger's testimony that he offered to resign as the outside meter reader, which offer Valley Electric rejected. In the opinion of the Court, this evidence tends to favor Valley Electric or is, at best, equivocal. Obviously, rejecting Winebarger's offer is consistent with a possible retaliatory action intended to entirely terminate a relationship with a former employee but it also suggests the importance of continued, competent meter reading. As noted above, the relationship between Valley Electric and Trent did not cease entirely. Rather, Trent continued using Valley Electric's facilities and was temporarily employed by Valley Electric, with Dohlen's approval. This subsequent relationship between Valley Electric and Trent, with Dohlen's approval, shows a lack of personal animosity on the part of Dohlen. Further, Dohlen's rejection of Winebarger's offer is consistent with Dohlen's stated reason that he terminated Trent to protect Valley Electric's meter reading. Winebarger read and was responsible for reading fourteen books each month. Trent was responsible for only two books. As

Dohlen testified, terminating Trent rather than Winebarger resulted in the least possible short-term disruption to Valley Electric's meter reading.

Finally, against all of this evidence, the Court must address and weigh Dohlen's testimony, which testimony was the only direct evidence offered by either party concerning Trent's termination. Dohlen, alone, made the decision to terminate Trent and he testified, under oath, that he absolutely did not consider Trent's complaint. The Court is mindful that, in considering Dohlen's testimony, it can look to numerous factors, including Dohlen's ability to know about the things to which he testified, his ability to recall and describe events, and his manner and demeanor while testifying. The Court notes that Dohlen does have some interest in his testimony, as it reflects upon his character. In testifying, however, Dohlen placed himself in an unflattering light concerning his ability to manage and run Valley Electric. Indeed, Dohlen's own testimony suggests a certain degree of incompetence in his management abilities. Dohlen may have some loyalty to Valley Electric, but any recognition of that loyalty must be tempered by the acknowledgment that Dohlen is no longer employed by Valley Electric. Dohlen does not have a personal interest in the outcome of the case; he is not a party and cannot be held personally liable for his decision to terminate Trent. The Court has previously outlined the evidence that both supports and contradicts Dohlen's testimony. The Court is also mindful that none of the witnesses, including Dohlen, exhibited perfect recollection of all events. The lapses, however, did not indicate an effort to deceive but appeared as innocent losses of memory on the part of all witnesses.

The Court also recognizes that a great load is placed upon Dohlen's testimony. For obvious reasons, Dohlen's testimony is the only direct testimony that could be offered by either party regarding his reasons for deciding to terminate Trent. Nevertheless, the weight of evidence does not depend upon the number of witnesses produced by either side. Indeed, as the Court has previously noted, no weight can be given in favor of either party to Trent's inability to produce direct evidence of retaliation.

With this in mind, the entire circumstance and context of Dohlen's testimony created the striking and deep impression upon the Court that Dohlen was being entirely and completely truthful when he testified that he absolutely did not consider Trent's complaint about Ruralite's conduct in making the decision to terminate her. In making this finding, the Court notes that it paid particular attention to Dohlen while testifying: to his mannerisms, his responses, his interaction with counsel for both parties and with the Court. The Court was also well aware that Trent had provided evidence that Dohlen's decision to terminate her was pretext, in light of which the Court received Dohlen's testimony with a healthy dose of skepticism. Nevertheless, having carefully observed Dohlen testify, the Court must conclude and clearly state for the record that the Court perceived Dohlen as truthful, forthright, and honest. The Court has tried hundreds of trials and observed many thousands of witnesses testify, and accepts Dohlen's testimony as absolutely credible. The Court finds Dohlen's testimony that he absolutely did not consider Trent's complaint not only credible, but honest and truthful. The Court reaches this conclusion in light of all the evidence both in support of

and against his testimony and in light of Dohlen's testimony and his demeanor while testifying. Dohlen's honesty and truthfulness leaves the Court firmly convinced that he terminated Trent solely to protect Valley Electric, even in light of Trent's specific and circumstantial evidence suggesting a contrary conclusion.

The Court notes that, given the benefit of hindsight, Dohlen's decision to both employ and terminate Trent and Valley Electric's intermittent attention to meter reading demonstrates, at best, an inconsistent commitment to a critical business function. Dohlen's actions do not demonstrate a consistently high ability in the administration of the utility and, indeed, suggest he probably made some poor decisions. The Court, however, is not called upon to hold Valley Electric liable because Dohlen demonstrated less than perfect judgment in his effort to protect Valley Electric's meter reading function. The job of this Court is not to decide, after the fact, whether Valley Electric could have better protected meter reading. Rather, the Court must decide only whether the [sic] Dohlen terminated Trent to protect its meter reading.

Given that this Court finds Dohlen testified truthfully, the Court finds that Trent was not terminated in retaliation for complaining about the Ruralite representative's inappropriate comments but was terminated solely in an effort, however imprecise and imperfect, to reduce a risk to a critical business function of Valley Electric. Further, as noted above, this Court will not accept Trent's suggestion that the Ninth Circuit has mandated that this Court enter judgment in her favor despite a finding that Dohlen testified truthfully. To accept Trent's suggestion, this Court would be required to conclude that the Ninth

Circuit has usurped this Court's duty to judge the credibility of witnesses while testifying. Accepting this suggestion would further require a finding that the Ninth Circuit has held that it is entirely irrelevant to a proper resolution of this matter to determine whether the trial's critical witness, the witness whose very decision is at issue, testified truthfully. Nothing within the Ninth Circuit's opinion supports or even suggests such an absurd conclusion. This Court has the duty to judge the credibility of all witnesses and has exercised that duty in light of all evidence that was received at trial.

This opinion shall serve as the Court's findings of fact and conclusions of law. Judgment is appropriate in favor of Defendant and will be entered accordingly.

DATED this 16 day of June, 1998.

/s/ Lloyd D. George
Lloyd D. Georg
United States District Judge

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTORIA L. TRENT, a/ka VICTORIA L. WINEBARGER, Plaintiff-Appellant, vs. VALLEY ELECTRIC ASSOCIATION, INC., Defendant-Appellant.	No.: 98-16228 D.C. No.: CV-S-92-00617-LDG AMENDED ORDER (Filed Jan. 6, 2000)

Before: WOOD, Jr.*, KOZINSKI, and RYMER, Circuit Judges.

The order issued on December 27, 1999, is amended as follows:

The first paragraph of the order should read "The panel has voted to deny the appellant's petition for rehearing and to reject the suggestion for rehearing en banc," rather than "The panel has noted to deny the appellant's petition for rehearing and to reject the suggestion for rehearing en banc."

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* The Honorable Harlington Wood, Jr., United States Circuit Judge for the Seventh Circuit, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTORIA L. TRENT, a/ka VICTORIA L. WINEBARGER,	)	No.: 98-16228
	)	D.C. No.: CV-S-92-00617-LDG
Plaintiff-Appellant,	)	ORDER
vs.	)	(Filed Dec. 27, 1999)
VALLEY ELECTRIC ASSOCIATION, INC.,	)	
Defendant-Appellant.	)	

Before: WOOD, Jr.*, KOZINSKI, and RYMER, Circuit Judges.

The panel has noted to deny the appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Harlington Wood, Jr., United States Circuit Judge for the Seventh Circuit, sitting by designation.

APPENDIX G

Valley Electric Association
P.O. Box 237
Pahrump, Nevada 89041

TELEPHONE (702) 727-5312

April 7, 1989

Jose De Jesus
Equal Opportunity Representative
1515 E. Tropicana Ave.
Suite 590
Las Vegas, Nevada 89158

Re: Valley Electric Association/Trent
NERC #0131-89-047L

Dear Mr. De Jesus:

Jack Winebarger started reading electric meters for Valley Electric in March 1985. In September, 1987, a verbal meter reading contract was entered into between Mr. Winebarger and Valley Electric. Pursuant to this oral contract, Mr. Winebarger was hired as an independent contractor, and he was to hire his own employees, as needed, to assist in reading approximately 3,000 meters in Pahrump valley. At the time the verbal contract was entered into in September 1987, it was agreed that the contract would be reviewed by Valley Electric and Mr. Winebarger in one year.

It was, therefore, no coincidence that discussions regarding a new contract commenced on August 11, 1988, and that on September 7, 1988, a written contract was entered into between Valley Electric and Mr. Winebarger whereby Mr. Winebarger agreed to read meters for Valley

Electric during the following year. A copy of that contract is attached hereto as Exhibit "A".

The reason that a written rather than a verbal contract was entered into with Mr. Winebarger was due to of the increased complexity of his responsibilities and the necessity that Valley Electric would have a legally binding and enforceable contract clearly setting forth their obligations and duties.

Reading meters in Pahrump valley is not similar to reading meters in a metropolitan area, like Las Vegas. Meter reading commences on the 11th day of each month and must terminate on the 19th day of each month so that bills can be mailed to each member by the 25th day of each month. The 3,000 Pahrump valley meters are divided in to 16 books. Mr. Winebarger has three employees to assist him in reading all but two of those books each month, and they travel approximately 1200 miles per month in their duties.

Prior to entering into the verbal contract with Mr. Winebarger Valley Electric made the decision to have one of its employees, not an employee of Mr. Winebarger, read two meter books each month. In this way, a Valley Electric employee would be familiar with each of the routes and, over a period of 8 months, would have read every meter in the valley. The purpose of this decision was to protect Valley Electric, in the event that Mr. Winebarger should choose not to read meters, Valley Electric would have at least one employee upon whom it could rely to assist another independent contractor who would not be familiar with the routes and the location of each of the meters. Valley Electric was justifiably concerned that

if its independent contractor declined or was unable to read meters, and if no Valley Electric employee was familiar with the process, that they would have a serious problem.

Mr. Winebarger was not an employee of Valley Electric but had been a independent contractor for over 3 years when the decision to terminate Ms. Trent was made. Mr. Winebarger has three employees and pursuant to his contract is required to read 7/8ths or approximately 2625 of the 3000 of the meters in Pahrump valley every month. The in-house Valley Electric employee, in this case Ms. Trent, reads 1/8th or approximately 375 meters each month and takes a different route every month. Mr. Winebarger's services had been satisfactory since March of 1985, while Ms. Trent had held that position only since February 8, 1988. If Mr. Winebarger had been terminated, rather than Ms. Trent, Valley Electric would have had to have found a suitable replacement of not only him, but possibly all of his employees. His replacement would have to have been financially responsible, a good manager of people and dependable. This position was critical to the efficient operation of Valley Electric and his position would have been more difficult to fill than Ms. Trent's position.

Valley Electric is a small company with twenty-eight employees in Pahrump valley. The office staff of ten have no experience in reading meters. The outside linemen are fully involved in maintaining the electric system. Although, they would be capable of meter reading to remove them from their ordinary job for the purpose of reading meters would be disruptive and could jeopardize the entire system.

Thus, when the management of Valley Electric recognized that the purpose of having an independent in-house meter reader was not being accomplished with Ms. Trent it was a matter of great concern. If Mr. Winebarger should leave the valley or decline to continue readings meters, for whatever reason, Ms. Trent, due to her relationship with Mr. Winebarger, might decline to read meters or terminate her employment. Therefore, Valley Electric would be left without any experienced meter readers. Once the realization that their goal of having an independent employee as a meter reader was not being met due to their relationship, Valley Electric determined that a change must be made. In view of the fact that Mr. Winebarger had been a reliable and satisfactory independent contractor working on behalf of Valley Electric for three and one half years reading 7/8ths of all meters in the valley every month, and that Ms. Trent had been an employee for only seven months, it was felt that it was in the best interest of Valley Electric, to retain Mr. Winebarger's services. If the roles had been reversed and Ms. Trent had been the independent contractor and Mr. Winebarger, the short term employee would be reading only 1/8th of the books every month, Mr. Winebarger would have been the person discharged and Ms. Trent would have been the person retained. The fact that Mr. Winebarger was a male and Ms. Trent a female had no impact on the ultimate decision.

The safety meeting incident that occurred on July 20, 1988, and was reported by Ms. Trent to management on August 19, 1988 was not a consideration in the decision to terminate Ms. Trent. The comments made at the safety meeting, of which Ms. Trent complained, were not made

by an employee of Valley Electric but rather by an employee of the Ruralite Services, Inc. which makes safety presentations to rural electric companies throughout Nevada. As soon as the incident was brought to the attention of management, appropriate steps were taken to notify Ruralite that such behavior was not acceptable. Insofar as the Valley Electric was concerned, the issue was closed as soon as Ms. Trent made her comments, and Valley Electric wrote a letter to the Ruralite. No similar complaints had been made in the past by Ms. Trent or any other employee. Hopefully, incidents of that nature will not occur in the future, however, if they do, appropriate steps will again be immediately taken to remedy the situation. Attached hereto is the letter that was written to Ruralite following Ms. Trent bringing the matter to our attention.

There was absolutely no relationship between the business decision to terminate Ms. Trent and her bringing the safety meeting incident to our attention. The safety meeting incident occurred on July 20, 1988 and Ms. Trent brought the matter to our attention on August 19, 1988. The first discussion with Mr. Winebarger regarding the renewal of his contract as an independent meter reader, took place on August 11, 1988, 8 days earlier. September 19, 1988 was the last day meters were read in Pahrump valley. It was after that work was completed that the action was taken to terminate Ms. Trent. It was not taken earlier as it would have hindered the meter reader process as it would have been one employee short.

The relationship between Mr. Winebarger and Ms. Trent is not and has not been an issue. That relationship was known to Valley Electric before and during Ms.

Trent's employment. The decision to terminate Ms. Trent was strictly a business decision in order to provide Valley Electric with the protection of having in-house an independent employee being familiar with the routes and meters to be read in Pahrump valley. Since Each month the meter readers drive approximately 1,200 miles to read 3,000 meters, it is obvious that this is a major function, and one that must be done properly and in a timely manner.

The person hired to replace Ms. Trent is Randy Nolan. Mr. Nolan is a former Valley Electric employee and is familiar with meter reading. Prior to Ms. Trent being terminated, no conversations had been held with Mr. Nolan about his replacing Ms. Trent. Mr. Nolan's starting salary was the base salary for that position, and was identical to that of Ms. Trent's salary considering the general wage increase that was granted to all employees by the Board of Directors effective November 1988. Mr. Earl Hatfield held a similar position prior to Ms. Trent starting in 1985, and his salary was also at the bottom of the pay scale. This position has been held by both men and women, and no consideration was given to gender of the employee when the hiring decision was made. When Ms. Trent was hired there were both male and female applicants and Ms. Trent was the person selected.

Sincerely,

/s/ Ross Dohlen
ROSS DOHLEN

/s/ Richard Burasco
RICHARD BURASCO

STATE OF NEVADA)
) ss:
COUNTY OF NYE)

H.C. COCHRELL
Notary Public – State of Nevada
[SEAL]
COUNTY OF NYE
My Appointment expires:
September 24, 1989

On 4/7/89, 1989 personally appeared before me, a notary public, ROSS DOHLEN, who acknowledged that he executed the above instrument.

/s/ H. C. Cochrell
(Signature)

STATE OF NEVADA)
) ss:
COUNTY OF NYE)

H.C. COCHRELL
Notary Public – State of Nevada
[SEAL]
COUNTY OF NYE
My Appointment expires:
September 2, 1989

On 4/7/89, 1989 personally appeared before me, a notary public, RICHARD BURASCO, who acknowledged that he executed the above instrument.

/s/ H. C. Cochrell
(Signature)

APPENDIX H

EXHIBIT A

CONTRACT

This Contract is made and entered into this 7th day of September, 1988, between JACK WINEBARGER, hereinafter referred to as ("WINEBARGER") and VALLEY ELECTRIC ASSOCIATION, INC., hereinafter referred to as ("VALLEY").

WHEREAS, VALLEY is a non-profit electric utility providing electric power.

WHEREAS, VALLEY has need of a person to read electric meters as an independent contractor and not as an employee or agent.

NOW THEREFORE, for good and valuable consideration, it is hereby agreed between WINEBARGER and VALLEY as follows:

1. WINEBARGER is hereby hired as an independent contractor, and not as an employee or agent of VALLEY, for the purpose of performing meter readings.

2. The term of this contract shall be for twelve (12) months commencing September 1, 1988 ___, and terminating September 1, 1989.

3. VALLEY will pay WINEBARGER as compensation for his services at sixty-four ($.64) cents per electric meter read by WINEBARGER, any meters estimated will not be compensated, with a maximum of sixteen (16) books being read each month. All the electric meters listed in the electric meter books shall be read commencing on the 11th day of each month and completed on the

19th day of each month. The electric meter books shall be returned to VALLEY on the 19th day of each month unless that day falls on a Saturday, Sunday or legal holiday, and in that event, on the next day.

4. WINEBARGER will provide VALLEY with a statement each month after all electric meters are read with a breakdown of meters read and wages earned by each of WINEBARGER'S employees for Nevada State Industrial Insurance. Payment will be made by Valley four (4) days after receipt of the statement.

5. WINEBARGER will provide a vehicle to read the electric meters listed in eight (8) meter books, and VALLEY shall pay to WINEBARGER, as additional compensation, fifty cents per mile for each mile driven in said vehicle in the performance of this contract. VALLEY will provide WINEBARGER with a vehicle to be used to read the electric meters listed in eight (8) meter books at no additional cost to WINEBARGER.

6. VALLEY shall provide Nevada State Industrial Insurance for WINEBARGER.

7. The parties intend that an independent contractor-employer relationship will be created by this contract. VALLEY is interested only in the results to be achieved, and the conduct and control of the work will lie solely with WINEBARGER. WINEBARGER is not to be considered an agent or an employee of VALLEY for any purpose, and the employees of WINEBARGER are not entitled to any of the benefits that VALLEY provides for its employees.

8. The work to be performed under this contract will be performed entirely at WINEBARGER's risk, and WINEBARGER assumes all responsibility for the condition of the tools and equipment used in performance of this contract except for the vehicle provided by VALLEY and agrees to indemnify and hold VALLEY harmless for any and all liability, loss, claim, demand or damage arising in any way out of the performance of this contract.

9. In the performance of the services and in the hours WINEBARGER is to work on any given day will be entirely within WINEBARGER's control, and VALLEY will rely upon WINEBARGER to put in such number as hours as is reasonably necessary to fulfill the spirit and purpose of this contract. WINEBARGER shall provide experienced and qualified personnel to carry out the work to be performed and shall be responsible and in full control of the work of such personnel.

10. WINEBARGER shall provide experienced and qualified back up personnel in addition to regular personnel to carry out the work to be performed. VALLEY will provide compensation for backup training up to one thousand ($1,000.00) dollars per calendar year when needed. Trainees will be compensated at a rate of $5.00 per hour. If additional training is required in a calendar year, WINEBARGER will submit a request to VALLEY for consideration.

11. WINEBARGER and WINEBARGER's employees will be provided with and shall wear a VALLEY uniform.

1. WINEBARGER will be provided with three (3) sets of VALLEY uniforms.

2. WINEBARGER's regular personnel will be provided with four (4) VALLEY shirts.

3. WINEBARGER's back up personnel will be provided with two (2) VALLEY shirts.

12. VALLEY shall not deduct withholding taxes, FICA or any other tax required to be deducted for an employee. WINEBARGER hereby acknowledges that such deductions and taxes are his responsibility as an independent contractor.

13. Other work duties performed, WINEBARGER will be at an hourly rate of $10.00 per hour.

VALLEY ELECTRIC
ASSOCIATION, INC.

By /s/ Richard F. Burasco

/s/ Jack Winebarger
JACK WINEBARGER

9-7-88
Date

APPENDIX I

AFFIDAVIT OF ROSS L. DOHLEN

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

ROSS L. DOHLEN, being first duly sworn, deposes and says:

1. I am over the age of eighteen years, have personal knowledge of all matters set forth herein, and I am competent to testify thereto.

2. I make this affidavit in support of Defendants' Opposition to Plaintiff's Partial Motion For Summary Judgment and Cross Motion for Summary Judgment submitted on behalf of Defendant Valley Electric Association ("*VEA*").

3. I have been employed at VEA since 1981 as the General Manager.

4. VEA provides safety and training services for its employees through monthly safety programs. VEA has an arrangement with Ruralite Services, Inc. ("Ruralite") so that Ruralite conducts five monthly safety meetings each year.

5. To the best of my knowledge, Ruralite is a non-profit corporation based in Oregon.

6. Ruralite sets its own agenda for each meeting which they conduct for the employees of VEA. VEA does not actively participate in the meetings conducted by Ruralite, nor does VEA exercise any control over the

manner and implementation of these seminars. Because no employee other than Plaintiff has ever complained about Ruralite's presentations, VEA has never has the need to actively participate in the meetings conducted by Ruralite or exercise any control over the manner and implementation of Ruralite's seminars.

7. Ruralite conducts safety seminars for VEA, along with 70 or 80 other cooperatives and also distributes a monthly publication for their consumers. Ruralite generally presents the same seminars to all of the cooperatives.

8. On or about August 18, 1988, the date of Plaintiff's employee evaluation, the issue of a conflict of interest in Plaintiff's employment arose and the decision was made to dismiss the Plaintiff. There was no relationship between the decision to dismiss the Plaintiff and her protest of the comments made at the July 20, 1988 safety meeting.

9. That on or about August 19, 1988, Richard Burasco presented me with Plaintiff Victoria Trent's (the "*Plaintiff*") written statement wherein she protested the "profanity and sexually implied comments" made by the safety instructor at the monthly safety meeting. A true and correct copy of the statement given to me by the Plaintiff is attached hereto as *Exhibit "1"* and is incorporated herein by this reference.

10. The comments made at the safety meeting of which Plaintiff complained were not made by an employee of VEA, rather such comments were made by an employee or Ruralite, who conducted this safety presentation to VEA and to other rural electric companies throughout Nevada.

11. In response to the Plaintiff's written statement I notified Ruralite that such behavior was not acceptable, by a letter dated August 31, 1988. A copy of the letter to Ruralite is attached hereto as *Exhibit "2"* and is incorporated herein by this reference.

12. No complaints regarding Ruralite's presentation were made by any employees of VEA, other than Plaintiff.

13. On September 19, 1988, a meeting was held for the purpose of dismissing Plaintiff due to the conflict in interest. The Plaintiff signed a Resignation at that meeting.

14. During the September 19, 1988 meeting, Plaintiff did not at any time state that she had filed nor did Plaintiff threaten to file a charge of discrimination against VEA with the Nevada Equal Rights Commission or any other governmental agency.

15. Prior to the September 19, 1988 meeting with Plaintiff, Plaintiff did not at any time indicate that she filed or intended to file a charge of discrimination with the Nevada Equal Rights Commission or any other governmental agency.

16. Prior to Plaintiff filing a charge of discrimination with the Nevada Equal Rights Commission, I had no knowledge or her intent to file such a charge with the Nevada Equal Rights Commission or with any other governmental agency.

17. I have nothing further to say.

Dated this 16th day of November, 1992.

/s/ Ross L. Dohlen
ROSS L. DOHLEN

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

On 11/16/92, personally appeared before me, a notary public, ROSS L. DOHLEN, personally known (or proved) to me to be the person whose name is subscribed to the above instrument who acknowledged that he executed the above instrument.

/s/ H. C. Cochrell
Notary Public

[SEAL]
Notary Public State of Nevada
COUNTY OF NYE
H.C. COCHRELL
My Commission Expires
Sept. 24, (illegible)

APPENDIX J

United States District Court
District of Nevada
Las Vegas, Nevada

VICTORIA L. TRENT, a/ka VICTORIA L. WINEBARGER,	*	Docket No.: CV-S-92-617-LDG (LRL)
Plaintiff,	*	Las Vegas, Nevada
vs.	*	July 31, 1995
VALLEY ELECTRIC ASSOCIATION, INC., et al.	*	8:36 a.m.
Defendants	*	

COURT TRIAL - DAY 1

THE HONORABLE LLOYD D. GEORGE PRESIDING
CHIEF UNITED STATES DISTRICT COURT JUDGE

* * *

[105] DOHLEN - DIRECT

MR. CHRISTOPHERSON: September 19th.

THE WITNESS: Answer is no.

BY MR. CHRISTOPHERSON:

Q Did you tell anyone to terminate her a month before September 19th?

A No.

Q Did you decide to terminate her on August 18th?

A No.

Q Did you decide to terminate her on August 18th?

A No.

Q August 19th?

A No.

THE CLERK: Plaintiff's next in order?

MR. CHRISTOPHERSON: Next in order.

THE CLERK: This will be Exhibit Number 18.

THE COURT: Exhibit number 18?

THE CLERK: Yes, Your Honor.

MR. CHRISTOPHERSON: Don't give that to the witness yet. We will get to that very shortly. Could you give him my exhibit book? Don't give that. Yeah.

THE CLERK: Your exhibit book?

MR. CHRISTOPHERSON: Yes.

THE CLERK: Which number?

MR. CHRISTOPHERSON: Number 3.

THE COURT: 3 has been received; hasn't it?

* * *

[136] DOHLEN – REDIRECT

was done in September.

Q Is your recollection better today than it was in 19

A No.

Q – 92.

A Not at all.

Q Do you have any reason to dispute your statement – and I'm not talking about whether you recall making a statement to terminate Victoria Trent in August of 1988. Do you have any basis today to say that you did not decide to terminate Victoria Trent in August of 1988?

A Other than my recollection, I do not.

Q And what you're testifying today is you don't recall deciding to terminate her in August of 1988?

A That's correct.

Q But in November of 1992, you did remember that.

A I did. By this I did.

Q And you're certain that it came to your attention the day before you met and discussed with Victoria Trent that she was complaining about conduct of Ruralite employees at a safety meeting; is that correct?

A That's correct.

Q And I believe when Mr. Close examined you, you acknowledged the fact that you would have received the written document on the 19th of August; is that what you acknowledged to him?

* * *

the last page that the signature by the employee is optional at the employee's discretion, the bottom left-hand side?

A Yes, so states, is optional.

Q Was this employee evaluation considered at all in making your business decision to terminate Vicky Trent?

A No.

Q Whether it was good or bad, you would – didn't – had not effect on you; is that correct?

A That's correct.

Q As it turned out, the evaluation was good?

A Correct.

Q And you've admitted all along that the reason for her termination was not her performance; is that correct?

A That's correct.

Q Exhibit 18 is the affidavit that counsel has been referring to, that was singed by you?

A Yes.

Q Who prepared that document? Did you prepare it? Was it prepared by the law firm?

A Yes, your law firm.

Q And so if there was an error made in that – in the preparation of that document, you didn't pick it up, it

was not because you put it in, it's because the law firm put it in; is that correct?

A That's correct.